

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**NORRIS B. GILMAN**  
Claimant

V.

**TRAINING & EVALUATION CENTER  
OF HUTCHINSON, INC.**  
Respondent

AND

**ACCIDENT FUND GENERAL INSURANCE**  
Insurance Carrier

Docket No. 1,071,182

**ORDER**

Respondent and insurance carrier (respondent), through Matthew J. Schaefer, of Wichita, request review of Administrative Law Judge Thomas Klein's April 24, 2015 preliminary hearing Order. James S. Oswalt, of Hutchinson, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the April 7, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

**ISSUES**

Claimant sustained a compensable work-related low back injury on May 2, 2014. Along with his physical injury, claimant alleged a psychological injury. The judge determined claimant likely suffered from long-term depression, but the work injury also caused an adjustment disorder diagnosis, which heightened claimant's depression. The judge ordered medical treatment for claimant's back injury, but denied claimant's request for authorized psychological treatment because claimant's accident was probably not the prevailing factor in causing claimant's psychological injury and need for medical treatment. The judge further concluded claimant was likely off work due to his psychological condition, but then ordered the payment of temporary total disability (TTD) benefits until claimant reached maximum medical improvement (MMI) for his back condition.

Respondent requests the decision be reversed, arguing claimant's preexisting psychological condition did not arise out of and in the course of his employment, claimant's psychological condition is not directly traceable to his physical injury and his physical accident is not the prevailing factor in his psychological condition, need for treatment or disability. Respondent asserts claimant may have had an aggravation of his psychological condition which would not be compensable. Respondent argues an order for TTD for a non-compensable condition is inappropriate.

Claimant argues the Board cannot review the appeal because payment of TTD is not a jurisdictional issue under K.S.A. 44-534a(a)(2). Claimant argues his TTD relates to his back injury because such benefits will continue until he is at MMI for his physical injury. In the alternative, claimant asserts he proved his physical injury exacerbated his underlying psychological condition and the Order should be affirmed.

The issues for review are:

1. Does the Board have jurisdiction to review the appeal?
2. If so, did claimant's psychological condition arise out of and in the course of his employment?

#### **FINDINGS OF FACT**

Claimant, 54 years old, worked for respondent as the director of affirmative enterprise. On May 2, 2014, claimant worked a special fund raising event where he spent several hours loading and unloading materials.<sup>1</sup> Around 10:00 p.m., claimant was unloading a bench from the bed of a pickup truck when he felt a “big sensation of pain” and a “twang” in his back, as if something shifted in his back.<sup>2</sup> Claimant reported the accident to respondent’s human resources director the next morning and was referred to the Hutchinson Clinic for treatment.

On May 3, claimant saw Jeffrey Thode, M.D., for complaints of low back pain and pain radiating down his left leg. He was given a 10 pound lifting restriction.

Claimant testified he was soon suffering from anxiety and was crying. He saw Christopher Rodgers, M.D., on May 5, for anxiety and stress-related issues. Dr. Rodgers recommended a trial of BuSpar. Claimant testified he was anxious because “a light switch flipped and all of a sudden I . . . was worried about everything. It was like if I can’t lift fricking ten pounds, how the hell am I going to make a living? I just got a house and - - it just seemed like everything was falling apart so fast.”<sup>3</sup> Claimant testified his psychological problems are joined to his physical injury because, “I had that physical thing happen [and] the very next day I’m bawling in the doctor’s office and that is so unlike me.”<sup>4</sup>

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<sup>1</sup> All dates refer to 2014 unless noted otherwise.

<sup>2</sup> P.H. Trans. at 12.

<sup>3</sup> *Id.* at 15.

<sup>4</sup> *Id.* at 34.

Claimant denied anything else caused his anxiety. He acknowledged having alcohol and drug treatment approximately 31 years earlier, but not being clinically depressed. Claimant testified that while he felt kind of depressed during his treatment, he did not have long-term depression. Claimant stated prior to May 2, he never sought treatment for any mental health care issues, but the death of his father eight years earlier was depressing.

Starting May 16, claimant saw Dana Richman, M.D., his primary care physician and respondent's authorized treating physician, for back complaints. Dr. Richman prescribed claimant Meloxicam and ordered physical therapy. Dr. Richman's records bifurcated treatment for claimant's back injury from treatment for anxiety.

On May 28, Dr. Richman noted claimant's anxiety was improved, but he should take sertraline (generic Zoloft).

On a June 24 examination, Dr. Richman noted stooping and bending bothered claimant's back, but he was slowly improving and "tolerating his work for the most part."<sup>5</sup>

On July 16, Dr. Richman noted claimant "finds himself more anxiety, more stressed by work by the way he has been feeling. He hurt his back and has been continuing to have problems with this."<sup>6</sup> Dr. Richman stated claimant had started taking sertraline over a month earlier. Further, claimant reported having "already dealt with anxiety and depression he feels for a number of years."<sup>7</sup> Dr. Richman increased claimant's sertraline dose, prescribed Ativan and referred him to Mark Goodman, Ph.D., for counseling.

In another July 16 document, Dr. Richman noted claimant reported his back would improve, then revert and it was bothering him at work. Dr. Richman referred claimant to Thomas Nienke, D.O., an orthopedic surgeon, for treatment of his back.

On July 18, claimant began treating with Dr. Goodman, who administered the Minnesota Multiphasic Personality Inventory (MMPI-2) and Culture Free Self-Esteem Inventory tests. This initial report did not mention claimant's injury or his back pain. Dr. Goodman opined claimant suffered from extremely low self-esteem. Dr. Goodman noted claimant wished he could be a "productive member of society" and did not feel "productive with his physical limitations."<sup>8</sup> Because Dr. Goodman could not prescribe medication, he referred claimant to Jeremy Tan, M.D., a psychiatrist at Horizons Mental Health Center.

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<sup>5</sup> *Id.*, Cl. Ex. 4 at 9.

<sup>6</sup> *Id.*, Cl. Ex. 4 at 6.

<sup>7</sup> *Id.*, Cl. Ex. 4 at 6.

<sup>8</sup> *Id.*, Cl. Ex. 2 at 14.

On August 4, claimant returned to Dr. Richman, who noted claimant could not concentrate and “[t]rying to work causes him more stress also. He is in the process of having further evaluation of his back that he injured at work. He is worried about losing his job because he cannot do what needs to be done at this time.”<sup>9</sup> Dr. Richman tapered claimant off sertraline and prescribed citalopram. By August 18, claimant told Dr. Richman he was tempted to use drugs or alcohol. Dr. Richman had claimant promise he would not use drugs or alcohol. Claimant told Dr. Richman he would not attempt suicide.

Claimant returned to Dr. Goodman for one of many visits on August 20. Claimant was worried about paying his bills. Dr. Goodman talked to claimant about not quitting his job until he was clear that was what he wanted to do. They also discussed claimant getting into a support group for people with physical disabilities and depression.

Respondent provided claimant accommodated work for about four months before claimant requested Family Medical Leave Act (FMLA) leave. Claimant testified he went on leave on August 30 because he struggled to stay within his restrictions and his back worsened. Claimant testified he thought his psychological problems were due to his injury:

When my back gets to feeling to where like I can do something, my house has gone to shit. This is embarrassing but, you know, these last two days are the only two that I’ve taken two baths two days in a row in God knows how long. When I do feel like I can - - you know, I’ve got three or four week’s worth of dishes sitting in the sink. That’s shit that we did for the clients to try to help them cope, and when I do feel like my mental thing is to where I can try to tackle some project, my back gives me about ten minutes of standing. I don’t even go to church anymore because we do a lot of standing and sitting and kneeling, and I can’t stand four minutes to sing a song in church. I can’t get down on my knees to pray. You know, I’m even worried about my salvation. This is just such crap. You know, my physical thing is screwed up, my mental thing is screwed up, my spirituality is screwed. I’m worried about losing my house. I’m at the point now where I ought to be helping my mother, for God’s sake and I don’t even know if I’m going to have a dollar next year.<sup>10</sup>

Claimant acknowledged no doctor took him off work for his physical injury and testified, “[T]he psychological part associated with the physical injury . . . made it necessary to take off work.”<sup>11</sup> He also testified he stopped working because both his low back and mental state were worsening. Claimant indicated he told Jerry Vinson, respondent’s human resources director, and Jim Preston, his immediate supervisor, that his mental state was related to his injury or accident.

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<sup>9</sup> *Id.*, Cl. Ex. 4 at 4.

<sup>10</sup> *Id.* at 25-26.

<sup>11</sup> *Id.* at 33.

Mr. Vinson testified he was unaware claimant was alleging his psychological condition was due to his physical injury, but was rather a long-term problem inherited from his father. He stated claimant “never once mentioned to me about it being work related.”<sup>12</sup> Mr. Vinson testified if claimant had not stopped working due to his mental condition, respondent would have continued accommodating his work restrictions. Mr. Vinson indicated claimant never told him he was unable to work within his restrictions. Mr. Vinson first became aware claimant was relating his psychological problems to his physical injury when he received a letter from claimant’s attorney.

On October 17, claimant started treatment at Horizons Mental Health Center (Horizons) which consisted of both therapy and medication management. Claimant presented to Susan Rohr, LCSW, with complaints of “depression and anxiety, getting really [panicky]” because of a back injury at work that “sent him into a tailspin.”<sup>13</sup> Claimant reported he was in chronic pain due to his back injury and it hurt to sit, stand or lay down. He reported hoping to be better after exhausting his FMLA leave, but he was not better and he was losing his job. Claimant reported wanting to abuse drugs or alcohol and having suicidal ideations because of his pain.

Dr. Goodman saw claimant on October 28. Claimant was most worried about his back. On November 4, claimant was seen at Horizons by Dale Anderson, Ph.D., a psychologist, who stated, “He is a friendly guy who has had a major setback in that he injured his back at work and this apparently caused a depressive reaction.”<sup>14</sup> Dr. Anderson further stated, “It is likely that his place of employment was a major contributor to the stress and to his injury, so he is now in the process of emotionally distancing himself from it.”<sup>15</sup> Dr. Anderson diagnosed claimant with a major depressive episode, severe, without psychotic features, and an anxiety disorder.

On November 7, claimant saw Dr. Tan and reported increasing depression over the prior several months, trouble concentrating and problems with his back. Claimant also reported having depression for “many years” to the point where he was “close to having a suicide attempt.”<sup>16</sup> Dr. Tan diagnosed claimant as having major depressive episode, severe, without psychotic features, and alcohol dependence, in addition to physical problems which included chronic back pain from the May 2014 injury. Dr. Tan prescribed claimant Zoloft and Abilify.

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<sup>12</sup> *Id.* at 42.

<sup>13</sup> *Id.*, Cl. Ex. 3 at 26.

<sup>14</sup> *Id.*, Cl. Ex. 3 at 22.

<sup>15</sup> *Id.*, Cl. Ex. 3 at 20.

<sup>16</sup> *Id.*, Cl. Ex. 3 at 11.

On November 18, in response to an inquiry by claimant's attorney, Dr. Goodman issued a causation and prevailing factor opinion stating:

1. His psychological injury was directly related and traceable to his low back injury. He reports feeling anxious and depressed right after his injury (e.g. within 24 hours). Prior to his back injury, he was not depressed nor anxious.
2. His sudden physical injury was the prevailing factor in causing his psychological injury and need for psychological treatment. Immediately after his sudden injury he sought help from Dr. Dana Richman for sudden depression and anxiety. Dr. Richman began treating Mr. Gilman with antidepressants and anti-anxiety medication with little or no progress at which point he referred Mr. Gilman to the undersigned.
3. Mr. Gilman was diagnosed by the undersigned with Major Depressive Disorder: Recurrent: Severe Without Psychotic Features. This diagnosis most likely was precipitated by his sudden work related accident in May 2014. People with this diagnosis are generally classified as disabled psychologically. At this point in time he has been treatment resistant to at least four or five antidepressant medications. His current mental condition is expected to last at least 12 months.<sup>17</sup>

On November 21, the judge ordered an independent medical examination (IME) with Carla Lehr, Ph.D., regarding causation of claimant's asserted psychological injury.

Claimant returned to Dr. Tan on November 25, and reported work related problems, money difficulties, health related problems and chronic pain affecting his mood.

Dr. Lehr evaluated claimant on January 9, 2015. Claimant told Dr. Lehr he had anxiety and depression because of fear that he could not pay his bills if he lost his job and his depression and anxiety were the direct result of his back injury. After administering psychological tests, Dr. Lehr diagnosed claimant with major depression (recurrent, severe, without psychotic features), adjustment disorder with anxiety and borderline personality disorder. Dr. Lehr noted the purpose of the IME was for her to assist in determining if claimant's psychological condition was directly attributable to his injury. She concluded:

Test results indicate the presence of a long standing personality disorder and a meager capacity to experience pleasure in life. Individuals with this profile tend to be pessimistic and may also engage in high risk-taking behaviors. Test results and written reports from [Drs.] Tan and Anderson suggest that Mr. Gilman's depression and anxiety are long-standing.<sup>18</sup>

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<sup>17</sup> *Id.*, Cl. Ex. 2 at 2.

<sup>18</sup> *Id.*, Cl. Ex. 7 at 3.

Claimant saw Dr. Goodman on January 13, 2015. Claimant reported being frustrated, in pain and unlikely to return to his former job. Claimant wanted to be on disability or trained through vocational rehabilitation.

Respondent terminated claimant's employment on April 1, 2015. Claimant had worked for respondent for five and one-half or six years.

In the April 24, 2015 Order, the judge stated:

The court ordered an IME with Carla Lehr, Ph.D for a causation opinion and treatment recommendations for the claimant's psychological condition. While she came to the conclusion that claimant's depression and anxiety are long standing, she did provide a secondary diagnostic impression of Adjustment Disorder with Anxiety. The court interprets this diagnosis to mean that claimant has temporary anxiety related to his physical injury, loss of employment and resources, as well as his underlying pre-existing psychological issues.

Dr. Nienke is designated as the authorized treating physician for the claimant's lower back. The court denies claimant's request for authorized psychological treatment. The court orders the respondent to pay TTD from April 2, 2015 based on the average weekly wage of \$653.23, and continuing until the claimant is released at MMI from Dr. Nienke. The court enters this somewhat inconsistent order in an attempt to balance the interests of the parties in the case. The respondent to its credit certainly met their responsibility to accommodate the claimant's condition to the extent possible. While the court finds that claimant likely suffers from long term depression, his adjustment disorder diagnosis strongly implies that his work injury heightened that condition. While that heightening or exacerbation of claimant's depression probably does not meet the prevailing factor standard requiring the court to authorize treatment, it is likely the factor that prevents the claimant from working at this time.<sup>19</sup>

Thereafter, respondent appealed.

#### **PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>20</sup> The burden of proof is on the claimant and the trier of fact shall consider the whole record.<sup>21</sup>

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<sup>19</sup> ALJ Order at 1-2.

<sup>20</sup> K.S.A. 2013 Supp. 44-501b(b).

<sup>21</sup> K.S.A. 2013 Supp. 44-501b(c).

K.S.A. 2013 Supp. 44-508 states, in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

. . .

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

To establish compensable traumatic neurosis, claimant must prove :

. . . (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.<sup>22</sup>

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<sup>22</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).



In addition to the requirements of *Love*, the Board has also applied the new law prevailing factor standard when assessing traumatic neurosis claims.<sup>23</sup>

In *Berger*,<sup>24</sup> the Kansas Supreme Court cautioned:

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

### ANALYSIS

#### **1. The Board has jurisdiction to hear respondent's appeal.**

Respondent contests the compensability of claimant's psychological condition, including whether it arose out of and in the course of his employment. Claimant argues respondent's argument actually concerns payment of TTD, which is not an appealable issue under K.S.A. 44-534a(a)(2). Claimant asserts the judge's ruling should not be disturbed because he had the authority to award TTD and did not exceed his jurisdiction even if he decided the issue wrongly.<sup>25</sup>

The Board considers the question of whether an injury is directly traceable to an original or primary injury and compensable as being under the umbrella of the "arising out of and in the course of employment" issue, which the Board has jurisdiction to hear on an appeal from a preliminary hearing order.<sup>26</sup>

Additionally, the Board may review this decision based on the judge exceeding his jurisdiction. The judge concluded claimant could not work because his injury exacerbated his preexisting depression. The judge noted claimant's psychological condition was probably not compensable, but he awarded TTD in an order he acknowledged was "somewhat inconsistent." This Board Member concludes the judge exceeded his jurisdiction in awarding TTD for a psychological condition he deemed not compensable.

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<sup>23</sup> *Moody v. KBW Oil & Gas Co.*, No. 1,061,663, 2014 WL 1758037 (Kan. WCAB Apr. 28, 2014).

<sup>24</sup> *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

<sup>25</sup> See *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>26</sup> Compare *Baty v. Woodhaven Care Center*, No. 1,047,549, 2010 WL 1445627 (Kan. WCAB Mar. 31, 2010); *Awad v. U.S.D.* No. 512, No. 1,037,459, 2008 WL 4149969 (Kan. WCAB Aug. 18, 2008) and *Coggs v. Swift Eckrich, Inc.*, No. 1,019,223, 2005 WL 1983412 (Kan. WCAB July 1, 2005) to *Ayers v. Brackett*, No. 1,000,987, 2003 WL 23172903 (Kan. WCAB Dec. 30, 2003).

**2. Claimant's traumatic neurosis did not arise out of and in the course of his employment.**

The evidence regarding the cause of claimant's current psychological distress is conflicting. The fact claimant was crying in a doctor's office three days after his accident could show a cause and effect between his physical injury and him emotionally falling apart. Such fact also could demonstrate claimant's preexisting psychological condition was the prevailing cause which predisposed him to have an emotional breakdown.

Dr. Anderson noted claimant's injury apparently caused a depressive reaction. Claimant told Ms. Rohr his injury caused him depression and anxiety. Dr. Goodman provided directly traceable and prevailing factor opinions in claimant's favor. Also, there was no showing claimant was on psychiatric medication or receiving mental health treatment prior to his accidental injury.

However, the record also contains evidence claimant had depression and anxiety for years prior to his accidental injury. Dr. Richman noted claimant had anxiety and depression for years. Claimant told Dr. Tan he had depression for several years. The neutral psychologist, Dr. Lehr indicated "Mr. Gilman's depression and anxiety are long-standing."

This is a close call and a difficult decision. Dr. Lehr did not explicitly use "directly traceable" or "prevailing factor" language, but she seems to indicate the cause of claimant's psychological distress is his preexisting depression and anxiety. Considering all of the evidence and the state of the current record, this Board Member concludes the prevailing factor in claimant's current psychological condition is his preexisting depression and anxiety. Further, claimant's current depression and anxiety are not directly traceable to his physical injury.

**CONCLUSION**

Based on the current record, this Board Member concludes claimant did not prove he sustained a compensable traumatic neurosis.

**WHEREFORE**, the undersigned Board Member reverses the April 24, 2015 preliminary hearing Order to the extent the judge exceeded his jurisdiction when awarding TTD benefits for a psychological condition that did not arise out of and in the course of claimant's employment.<sup>27</sup> However, the order appointing Dr. Nienke is undisturbed.

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<sup>27</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2015.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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